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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 696

EDWARD J. DILLON, IN THE MATTER OF THE PETITION OF MANLEY B. STRAYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 28–43) is reported at 346 F. 2d 633. The opinion of the district court (Pet. App. 13–27) is reported at 230 F. Supp. 487.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1965. The order of the court of appeals denying a timely petition for rehearing was entered on July 27, 1965. The petition for a writ of certiorari was filed on October 25, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fifth Amendment entitles an attorney who has been directed by a federal court to represent an indigent to compensation for his services.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part as follows:

> * * * nor shall private property be taken for public use, without just compensation.

STATEMENT

In a proceeding under 28 U.S.C. 2255, Edward J. Dillon sought to set aside a conviction for armed bank robbery, on the ground that his plea of guilty had been induced by a false promise of leniency. The district court denied Dillon's request for the assignment of counsel and, after a hearing, declined to set aside the sentence. See *Dillon* v. *United States,* 230 F. Supp. 487, 489 (D. Ore.). The court of appeals reversed the district court's denial of relief on the ground that counsel should have been appointed. *Dillon* v. *United States,* 307 F. 2d 445.

Upon remand, the district court appointed petitioner to represent Dillon. At the time of the appointment, the district judge stated (230 F. Supp. at 496):

> * * * I think that in executing the command of the Court of Appeals I am conscripting your services for the benefit of another person to whom, I suggest, the government owes the duty to supply, and taking your property without just compensation.

> You, Mr. Strayer, and the members of your firm, have always been willing to represent indigent litigants without compensation, but in spite of your generosity, this court feels that you and other members of the bar should not be required to devote your time and lawyer tools, particularly in unusual cases of this kind, without some compensation therefor. * * *

Accordingly, the court invited petitioner to make application for compensation upon completion of his services.

At the hearing on remand, the district court held that Dillon's plea of guilty had not been coerced or induced by a false promise. However, the sentence was vacated on the ground that there had been a violation of Rule 32(a) of the Federal Rules of Criminal Procedure, and Dillon was held for re-sentencing. *Dillon* v. *United States,* 218 F. Supp. 948 (D. Ore.).

Petitioner then applied for compensation, requesting a fee of $5,000, plus expenses of $24.50.

The district court held (1) that it had jurisdiction under the Tucker Act to award compensation either on the basis of an implied contract or the Fifth Amendment,[1] and (2) that its order requiring petitioner to represent Dillon was a taking of his property for a public use within the meaning of the Fifth Amendment. The court ordered payment of compensation in the amount of $3804.54, representing $35 per hour for 108 hours, plus $24.54 for expenses.

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[1] The Tucker Act gives district courts jurisdiction, concurrent with the Court of Claims, of claims not exceeding $10,000 "founded either upon the Constitution * * * or upon any express or implied contract with the United States * * *." 28 U.S.C. 1346 (a)(2).

The court of appeals reversed. The court pointed out that the obligation of an attorney, as an officer of the court, to represent indigents upon court order is an established tradition of the bar and that attorneys who fulfill this obligation have generally been compensated, if at all, only by statutory fees which would be inadequate under principles of just compensation. The court stated that an applicant for admission to the bar should be aware of this traditional professional obligation, and that, accordingly, he may be deemed to assume the obligation when he joins the bar. Thus, the court held, there is no "taking" in the Fifth Amendment sense, but merely the fulfillment of an assumed obligation.

ARGUMENT

Petitioner seeks review of a decision of the Court of Appeals for the Ninth Circuit which denied his contention that the ancient practice[2] of courts in calling upon members of the bar to represent indigent parties without compensation violates the Fifth Amendment's ban on the taking of property for public use without just compensation. Petitioner's contention is unmeritorious and has no support in any circuit.

1. Petitioner concedes that the representation of indigents upon court order is an established tradition of the legal profession, and, as pointed out by the

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[2] See, *e.g.*, ——— v. *Scroggs*, 1 Freeman 390, 89 Eng. Rep. 289 (K.B. 1674); *Anonymous* (Case 975), 12 Mod. 583, 88 Eng. Rep. 1535 (K.B. 1702). This Court has said, "Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Powell* v. *Alabama*, 287 U.S. 45, 73.

court of appeals, appointed counsel have generally been compensated, if at all, by flat statutory fees which would be clearly inadequate under constitutional standards of just compensation.[3] Petitioner's contention is that the basis of this professional tradition has been undermined by *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, and *Konigsberg* v. *State Bar of California,* 353 U.S. 252. In those cases the Court held that a "State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment" and that "the practice of law is not a matter of the State's grace." 353 U.S. at 238–239 n. 5. But the proposition that a State may not impose arbitrary and irrational restrictions on admission to the bar certainly does not lead to a conclusion that a professional duty recognized throughout centuries of Anglo-American history may not be imposed on the members of the bar. An obvious *non sequitur* is entailed in petitioner's contention that, since admission to the bar is in some senses a right rather than a

[3] As pointed out in the Appendix to the opinion of the court of appeals (Pet. App. 40–42), the vast majority of courts have refused to award non-statutory fees to appointed counsel, and statutory fees have generally been at a flat rate, without regard to the earning power of the particular attorney involved. Under constitutional principles of just compensation, a court would be bound to consider the alternative uses of the particular attorney's time and to award higher compensation to the attorney who could have charged his private clients a higher fee for the time which the court requires him to spend representing an indigent. Compare Orgel, *Valuation under Eminent Domain,* §§ 28–30 (2d ed., 1953).

privilege, no burdens may be placed upon the exercise of that right. See *Lathrop* v. *Donohue*, 367 U.S. 820, where the Court upheld a requirement that lawyers join and pay dues to an integrated State bar. *Schware* and *Konigsberg* did not hold that the right to practice law is the right to enjoy all the privileges of the legal profession without any of the obligations that have traditionally accompanied those privileges. They removed unconstitutional obstacles to admission to the legal profession, but worked no change in the nature of the duties of the members of the profession.[4]

Petitioner points out that the recent expansion of the right of indigents to counsel may have increased the onerousness of the lawyer's obligation to represent indigents. However, petitioner does not contend that the burden of representing indigents has fallen disproportionately on his shoulders or that his selection from among his colleagues at the bar was invidiously arbitrary, unfair or unreasonable. Moreover, as the court below recognized (Pet. App. 35), resolution of the problems of providing and compensating counsel for the indigent calls for complex legislative judgments involving a variety of factors which would not be relevant under constitutional principles of "just compensation." It may, for example, be appropriate to consider the extent to which

[4] Petitioner urges that the tradition of representing indigents has been established largely in connection with criminal prosecutions (Pet. 9). However, collateral proceedings such as those under 28 U.S.C. 2255, while technically civil in nature, exist for the purpose of vindicating the procedural rights of criminal defendants, and thus are fairly included within the tradition of representing indigent criminal defendants.

the burden of representing indigents may fairly be allocated to the bar in light of the benefits accruing to lawyers from statutes prohibiting the unauthorized practice of law. Such decisions seem implicit in many State statutes providing for compensation of appointed counsel [5] as well as in the Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. 3006A.[6]

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[5] For a summary as of May 1, 1964, of State statutes regarding appointment of counsel for indigents, see Silverstein, *Defense of the Poor in Criminal Cases in American State Courts: A Preliminary Summary* (American Bar Foundation, 1964) 57–78. Many of the statutes providing compensation establish dollar limitations which vary, if at all, only according to the number of days of trial or the type of case (felony, misdemeanor; capital, non-capital). Four States have no provision for compensation of appointed counsel. Silverstein, "The Continuing Impact of *Gideon* v. *Wainwright* on the States," 51 A.B.A.J. 1023, 1024–1025 (November, 1965).

[6] The Criminal Justice Act requires compensation of appointed counsel in criminal prosecutions in the federal courts. The rate of compensation is not to exceed $15 an hour for time in court or before a commissioner, and $10 an hour for time outside court, with a total limit of $500 for a felony case and $300 for a misdemeanor case. The total limit may be exceeded in extraordinary circumstances with the approval of the chief judge of the circuit, upon a certification from the district court.

In the Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (the Allen Committee Report), which led to the Criminal Justice Act of 1964, a limit of $15 an hour was recommended, with no maximum per case. *Id.*, at pp. 41–43, 149–150. The Committee recognized that "the $15 hourly rate is conservative and considerably below that which is charged by retained counsel for similar services. No member of the Committee believes the figure is genuinely compensatory." *Id.*, at p. 55.

See also the remarks of Representative Poff, 110 Cong. Rec. 457 (Jan. 15, 1964) regarding the bill which became the Criminal Justice Act: "it is my strong conviction * * * that the

In view of the rapidly evolving law on the right to counsel, the efforts of State and federal governments and the bar to develop satisfactory mechanisms for supplying counsel,[7] and the complex legislative judgments involved, it seems singularly undesirable for the court to freeze the whole situation in relatively inflexible constitutional terms.[8]

2. Quite independently, the decision below is correct because a lawyer's personal services are not "property" within the meaning of the just compensation clause. That clause was intended as a limitation on the power of eminent domain,[9] and it would not appear that it is under the eminent domain power that personal services have customarily been requisitioned by the State. Moreover, in those situations where the State has the power to take a citizen's personal services—*e.g.*, for military service, for jury duty, as a witness—whatever compensation is paid rarely conforms to Fifth Amendment principles of just compensation:

> * * * the compensation is awarded upon a different principle from that employed when property is taken by eminent domain, as the

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practicing attorney owes a responsibility to his community to perform some services gratis. We have heretofore asked him to assume the entire burden in that regard. This legislation is intended to make it possible to lighten his burden."

[7] See Silverstein, "The Continuing Impact of *Gideon* v. *Wainwright* on the States," 51 A.B.A.J. 1023 (November, 1965).

[8] A decision sustaining petitioner's claim under the Fifth Amendment would, of course, be applicable to the States under the Fourteenth Amendment. See *Chicago, Burlington & Q. R.R.* v. *Chicago*, 166 U.S. 226, 241.

[9] See *United States* v. *Jones*, 109 U.S. 513, 518; Nichols, *Eminent Domain*, § 14 (3d ed., 1964).

> method sanctioned by ancient practice is to pay all persons alike, regardless of what their time or services may be worth. A statute applying the same method to eminent domain and fixing a uniform price for land taken for the public use, regardless of its actual value, would be clearly unconstitutional.

Nichols, *Eminent Domain* § 1.4[3] (3d ed., 1964). See, also, *Neely* v. *The State,* 63 Tenn. (4 Baxt.) 174 (1874) (just compensation clause of State constitution does not require compensation of jurors). Similarly, an expert witness is not constitutionally entitled to more than the fee for an ordinary witness simply because his time and services are worth more. *Bradley* v. *Davidson,* 47 App. D.C. 266, 284–285 (1918); *Ex parte Dement,* 53 Ala. 389 (1875); *Flinn* v. *Prairie County,* 60 Ark. 204, 29 S.W. 459 (1895); *Larimer County Commissioners* v. *Lee,* 3 Colo. App. 177, 32 Pac. 841 (1893). And an ordinary witness may constitutionally be required to serve without either compensation or reimbursement of travel expenses. *Daly* v. *Multnomah County,* 14 Ore. 20, 12 Pac. 11 (1886); *Henley* v. *State,* 98 Tenn. 665, 41 S.W. 352 (1897). In short, a lawyer ordered to represent an indigent is in the same position as a citizen ordered to jury duty, to appear as a witness, or to render military service—in each case, the person whose services are taken must rely on the legislature to provide him with compensation, since there is no taking of property in the constitutional sense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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